IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JON MARCUS, Plaintiff-Appellant, v. MICHAEL MUKASEY, et al., Defendants-Appellees.	No. 08-15643

MOTION OF THE ATTORNEY GENERAL FOR SUMMARY AFFIRMANCE AND STAY OF BRIEFING SCHEDULE

The Attorney General respectfully moves for summary affirmance. As explained below, this case is squarely controlled by *United States* v. *International Union of Operating Engineers*, 638 F.2d 1161 (9th Cir. 1979), which held that the Federal Election Campaign Act does not alter the Attorney General's traditional authority to institute criminal proceedings for violations of federal law. The identical issue is presented here. Because this appeal turns on a purely legal question "obviously controlled by precedent," summary affirmance is warranted. *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam); *see* 9th Cir. R. 3-6(b). The Attorney General also respectfully requests that the Court stay briefing of this appeal while this motion is pending. Counsel for the Federal Election Commission consents to this motion; counsel for appellant does not consent to this motion.

STATEMENT

Plaintiff-appellant Jon Marcus brought suit against the United States Attorney General and the Federal Election Commission Chairman, seeking declaratory relief from an alleged grand jury investigation into his campaign contributions during the 2004 presidential election. Order, 3/10/08, at 1-3 (attached as Ex. 1). Marcus contended that because the Federal Election Commission had not completed a civil investigation and referred the matter to the Attorney General, a grand jury investigation was contrary to requirements of the Federal Election Campaign Act, 2 U.S.C. § 437g. Order at 2.

The district court rejected Marcus's claim, relying on this Court's decision in *United States* v. *International Union of Operating Engineers,* 638 F.2d 1161 (9th Cir. 1979), which "held that Congress did not intend to impose a limitation on the ability of the Attorney General to prosecute violations of the Federal Election Campaign Act by allowing the Federal Election Commission to refer violations to the Attorney General." Order at 5. The court rejected Marcus's attempt to escape the force of *International Union* based on 1980 amendments to the Federal Election Campaign Act, explaining that those amendments worked no substantive change to the Attorney General's authority. Order at 5-6. Marcus timely appealed.

ARGUMENT

I. THIS COURT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION IN LIGHT OF *INTERNATIONAL UNION*

Marcus's suit rests on the premise that the Federal Election Campaign Act requires the Attorney General to abstain from exercising his authority over criminal violations of the campaign finance laws until after referral from the Federal Election Commission. This Court has already rejected such an argument, holding that "Congress did not intend to impose this limitation upon the power of the Attorney General to enforce the law." *Int'l Union,* 638 F.2d at 1162. That conclusion directly controls the outcome of this appeal. Summary affirmance is accordingly warranted.

Appellees in *International Union*, like Marcus here, claimed that the Federal Election Campaign Act required the Attorney General "to exhaust the administrative remedy before the Federal Election Commission (FEC), available under section 437g of the Act," before exercising authority over criminal violations of the Act. 638 F.2d at 1162. After noting that any such infringement on the Attorney General's prosecutorial authority "'would require a clear and unambiguous expression of the legislative will,'" *id.* (quoting *United States* v. *Morgan*, 222 U.S. 274, 282 (1911)), this Court assessed the Act's civil enforcement mechanisms and determined that "[n]othing in these provisions suggests, much less clearly and [un]ambiguously states, that action by the

Department of Justice to prosecute a violation of the Act is conditioned upon prior consideration of the alleged violation by the FEC. Indeed, it would strain the language to imply such a condition." *Id.* at 1163. The Court emphasized that Act's extensive legislative history reinforced this conclusion. *Id.* at 1165-68.

Marcus attempts to escape the force of *International Union* by contending that the decision was superseded by 1980 amendments to the Act—in particular, the requirement that the Commission refer violations to the Attorney General only "by an affirmative vote of 4 of its members." Order at 5-6 (quoting 2 U.S.C. § 437g(a)(5)(C)). The district court correctly rejected that argument, explaining that the cited provision worked no more than a procedural change. Order at 6; *see* H.R. Rep. No. 96-422, at 22 (1979) (stating that the provision merely "incorporat[ed] the language . . . of the [1976] Act regarding referral of knowing and willful violations to the Attorney General"). The relevant portions of the statute remain the same today as when *International Union* was decided, and no reason exists to depart from that controlling decision.

II. THIS COURT SHOULD STAY THE BRIEFING SCHEDULE

Marcus's opening brief is currently due on May 5, 2008. Where, as here, the outcome of an appeal is governed by longstanding precedent of this Court, full briefing is not warranted. The Attorney General respectfully asks the court to stay briefing pending disposition of this motion.

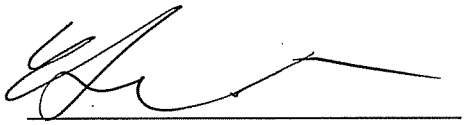
CONCLUSION

For the foregoing reasons, this Court should summarily affirm the judgment of the district court and stay the briefing schedule pending resolution of this motion.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

DIANE J. HUMETEWA
United States Attorney



MICHAEL S. RAAB
(202) 514-4053
ERIC FLEISIG-GREENE
(202) 514-4815
Attorneys, Appellate Staff
Civil Division, Room 7214
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

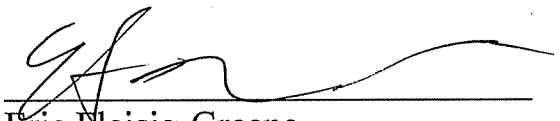
April 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2008, I filed and served the foregoing motion by causing an original and four copies to be sent to this Court by overnight delivery, and by causing one copy to be sent by electronic mail and overnight delivery to:

Michael R. Dezsi
Fieger, Fieger, Johnson, & Giroux PC
19390 W. Ten Mile Road
Southfield, MI 48075
248-355-1445

Greg J. Mueller
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
202-694-1559



Eric Fleisig-Greene
Counsel for the Attorney General

Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jon Marcus, Plaintiff, vs. United States Attorney General Michael B. Mukasey, and, Federal Election Commission, in their official capacities, Defendants.	No. CV 07-0398-PCT-EHC **ORDER**

Plaintiff has filed a Complaint for Declaratory Relief (Dkt. 1) and a Motion for Declaratory Relief (Dkt. 6)[1] concerning the Federal Election Campaign Act ("the Act"), 2 U.S.C. §§ 431 et seq., as amended. Plaintiff alleges that he is the target of a politically motivated investigation initiated by Defendants because of his political activities including his support and financial contributions to a particular candidate in the 2004 presidential campaign (Complaint, ¶ 1). Plaintiff asserts the following allegations in the Complaint:

[1]Plaintiff has lodged a Brief in Support of his Motion for Declaratory Judgment that exceeds the page limit by five pages. Plaintiff's Motion to Exceed Page Limit (Dkt. 9) will be granted.

> no one other than the Federal Election Commission can proceed with an investigation or prosecution of alleged violations of the Act ***until and only after the FEC [Federal Election Commission] has itself conducted an investigation and referred the matter to the Attorney General 'by an affirmative vote of 4 of its members.'*** 2 U.S.C. § 437g(a)(5)(C). Until such time that the FEC has made such a bipartisan referral to the Attorney General, the Attorney General has no authority, jurisdiction, or power to proceed with an investigation of alleged violations of the Act.

(Complaint, ¶ 10)(emphasis in original). Plaintiff alleges that the FEC has not made any such referral to the Attorney General (id., ¶ 11). Plaintiff further alleges that in or about October 2006, he was subpoenaed in Arizona to testify before a federal grand jury and that Defendants attempted to coerce Plaintiff to reveal constitutionally protected activities (id., ¶ 13). Plaintiff alleges that Defendants are violating the Act by proceeding with a criminal investigation without a congressionally mandated referral, engaging in an unlawful investigation for which they lack jurisdiction, and using Plaintiff's Fifth Amendment privilege as a mechanism to thwart the mandated role of the FEC to investigate and resolve in the first instance disputes involving campaign finance (id., ¶¶ 19-21).

Plaintiff seeks relief under 28 U.S.C. §§ 2201 and 2202, and Fed.R.Civ.P. 57, in the form of a declaration that Defendants' conduct is unlawful, unconstitutional and contrary to the requirements of the Act, and any other relief, including attorney fees, to which Plaintiff is entitled (Complaint, pp. 4-5; Dkt. 6 - Plaintiff's Motion for Declaratory Judgment, p. 3).

The named Defendants are the Attorney General of the United States and Federal Election Commission Chairman.

Defendant Attorney General has filed an Opposition to Plaintiff's Motion for Declaratory Judgment and a Motion to Dismiss (Dkt. 20) the Complaint for failure to state a claim for relief under Fed.R.Civ.P. 12(b)(6). A Motion to Dismiss and Combined Brief in Support of Motion to Dismiss and in Opposition to Motion for Declaratory Judgment (Dkt. 21) has been filed by Defendant "Federal Election Commission". This Defendant states that Plaintiff has improperly named the Chairman of the Commission as defendant but if Plaintiff

had a cause of action, the proper Defendant is the Federal Election Commission which alone has the powers and duties at issue in the case (Dkt. 21, p. 2 n. 1). This Defendant has further noted that Plaintiff has erroneously cited to the statutory provision under consideration as the "Federal Campaign Finance Act" and that the correct reference is to the "Federal Election Campaign Act" (id.).

The Court will substitute Attorney General Michael B. Mukasey for former Attorney General Alberto Gonzales. Fed.R.Civ.P. 25(d). The Court further will substitute the Federal Election Commission for Defendant Michael E. Toner, Chairman. Plaintiff has correctly referred to the Federal Election Campaign Act in his reply briefing (Dkt. 22, p. 2; Dkt. 26, p. 2).

The issues have been fully briefed by the parties, including the filing of Reply briefing (Dkt. 22, 23, 24). Plaintiff has filed a Motion to Amend Reply (Dkt. 25) which will be granted and Plaintiff's Amended Reply (Dkt. 26) will be considered. Defendant Federal Election Commission ("Commission") has filed three Notices of Supplemental Authority (Dkt. 27-29). Plaintiff has filed a Motion for Hearing and for Oral Argument (Dkt. 30) which Defendant Commission opposes (Dkt. 31).

The Court has considered the parties' briefing on the issues. The Court has determined that a hearing or oral argument would not materially assist its decision. Plaintiff's Motion for Hearing and for Oral Argument (Dkt. 30) will be denied.

A complaint generally must satisfy only the minimal notice pleading requirements of Fed.R.Civ.P. 8(a)(2), that is, "a short and plain statement of the claim showing that the pleader is entitled to relief." See Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). A court must accept all allegations of material fact as true and construe them in the light most favorable to the plaintiff. Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). "'Dismissal of the complaint is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief.'" Stoner v. Santa Clara County Office of Education, 502 F.3d 1116, 1120 (9th Cir. 2007)(quoting

McGary v. City of Portland, 386 F.3d 1259, 1261 (9th Cir. 2004)). Dismissal can be based on "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Plaintiff argues that the summary judgment standard should be applied to his Motion for Declaratory Relief (Dkt. 6, Brief, p. 3). In evaluating a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A material fact is one "that might affect the outcome of the suit under the governing law[.]" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact may be considered disputed if the evidence is such that a jury could find that the fact either existed or did not exist. Id., at 249. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). See also, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Defendants in their Motions to Dismiss have argued that the Attorney General has plenary authority over violations of the federal criminal law, that nothing in the Act's language clearly and unambiguously removes power from the Attorney General, and that the legislative history of the Act supports the view that Congress did not remove the Attorney General's power to initiate criminal proceedings under the Act. Defendants further argue that prior case precedent supports their position.

These same issues were raised and considered in the cases provided by Defendant Commission's notices of supplemental authority. See Barry Bialek v. United States Attorney General Alberto R. Gonzales, et al., Case No. 07-CV-00321-WYDPAC (D. Colo. June 28, 2007) (Dkt. 28), and Geoffrey N. Feiger, et al. v. Alberto R. Gonzales, United States Attorney General, et al., Case No. 07-CV-10533-DT (E.D. Mich. August 15, 2007) (Dkt. 29).

The instant case, and the two cited supplemental authority cases, stem from the same factual circumstances, that is, an investigation into alleged activity of a specific Michigan law firm. In both of the cited cases, the courts concluded that the plain language of the Act neither grants the Commission exclusive jurisdiction to enforce criminal violations of the Act nor infringes the Attorney General's plenary power to enforce criminal violations of the Act, that the legislative history demonstrates that Congress did not intend to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act, and that prior case law has held that criminal enforcement may either originate with the Attorney General or stem from a referral by the Commission to the Attorney General. Both courts further concluded that amendments to the Act did not overturn this case law precedent, including that of United States v. International Union of Operating Engineers, Local 701, 638 F.2d 1161 (9th Cir. 1979).

The Court agrees with the analysis and reasoning set forth in these two cases. The Court notes specifically that in Operating Engineers, the Ninth Circuit held that Congress did not intend to impose a limitation on the ability of the Attorney General to prosecute violations of the Federal Election Campaign Act by allowing the Federal Election Commission to refer violations to the Attorney General. The Ninth Circuit further held that it could not be implied that administrative processing and referral are a prerequisite to the initiation of litigation by the Attorney General. Id., 638 F.2d at 1161, 1163.

The Act provides that "[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions." 2 U.S.C. § 437c(b)(1). This "directive" applies to civil enforcement of the Act, not to criminal enforcement of the Act.

Plaintiff argues that the Act was amended in 1980 in direct response to the decision in Operating Engineers and that case is no longer applicable (Dkt. 6, Brief, p. 8). Plaintiff has not satisfactorily supported this argument as compared to Defendant Commission who argues that the amendments in part were at issue three weeks before the date of decision in Operating Engineers (Dkt. 21, p. 12).

As Defendants point out, the Act contained a referral provision before the amendment and this referral provision was analyzed and considered in Operating Engineers which held that it was not a prerequisite to the initiation of litigation by the Attorney General. The 1980 amendments added that if the Commission "by an affirmative vote of 4 of its members" determined that there is probable cause to believe that a knowing and willful violation has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States. 2 U.S.C. § 437g(a)(5)(C). This appears to be a procedural change which does not evidence a directive that alters the powers of the Attorney General.

Plaintiff also argues that with the 1980 amendments, an individual who may be subsequently charged criminally is allowed to "introduce as evidence a conciliation agreement" to demonstrate his lack of knowledge or intent to commit the alleged violation (Dkt. 6, Brief, p. 10). See 2 U.S.C. § 437g(d)(2). However, § 437g(a)(5)(C) provides that the Commission is not required to engage in the conciliation procedures set forth in § 437g(a)(4) before referring a matter to the Attorney General. Plaintiff's citation to the provision regarding a "conciliation agreement" does not support his claim that the power of the Attorney General has been limited.

Accordingly,

IT IS ORDERED that Michael B. Mukasey, Attorney General of the United States, and the Federal Election Commission, are substituted as Defendants.

IT IS FURTHER ORDERED that Plaintiff's Motion to Exceed Page Limit (Dkt. 9) is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend Reply (Dkt. 25) is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Hearing and for Oral Argument (Dkt. 30) is denied.

IT IS FURTHER ORDERED that Plaintiff's Motion for Declaratory Judgment (Dkt. 6) is denied.

IT IS FURTHER ORDERED that Defendants' Motions to Dismiss the Complaint (Dkt. 20 & 21) are granted.

IT IS FURTHER ORDERED that the Complaint (Dkt. 1) is dismissed with prejudice.

IT IS FURTHER ORDERED that Judgment shall be entered accordingly.

DATED this 10th day of March, 2008.

Earl H. Carroll
United States District Judge